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In The
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DOUG DECKER, the Oregon State Forester, in his official capacity, et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, et al.,

Respondents.

GEORGIA-PACIFIC WEST, INC., et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE RUFFED GROUSE SOCIETY IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

AMICUS CURIAE BRIEF OF THE RUFFED GROUSE SOCIETY 1

IDENTITY AND INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

I. The Decision Below Threatens The Continued Viability Of Early Successional Forest Species 6

A. Wildlife Dependent Upon Early Successional Forest Habitat Are Already Threatened By Declining Habitat 6

B. Silvicultural And Active Management Practices Have Been Shown To Increase The Habitat And Population Size Of Early Successional Species 9

C. Requiring Npdes Stormwater Permits For Forest Roads Will Have Adverse Economic Effects On Landowners, Industry, And State Agencies And Will Place Significant New Barriers Upon Active Forest Management 12

TABLE OF CONTENTS – Continued

Page

II. The Decision Below Ignores An Express Congressional Limitation Upon Judicial Review, Which, If Upheld, Would Result In Regulatory Chaos 17

A. The Court Of Appeals Did, In Fact, Invalidate The EPA's Silvicultural Rule.... 17

B. The "Arising After" Exception To 33 U.S.C. § 1369(b)(1) Does Not Apply Because The Silvicultural Rule Is Unambiguous 19

C. The Decision Below Would Result In Regulatory Uncertainty If Upheld 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page

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Auer v. Robbins, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997) 23

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Nw. Envtl. Def. Ctr. v. Brown, 640 F.3d 1063 (9th Cir. 2011) 4, 17, 20

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United States v. Duke Energy Corp., 411 F.3d 539 (4th Cir. 2005) 19

FEDERAL STATUTES

Clean Water Act

33 U.S.C. § 1311(a) 2

33 U.S.C. § 1342 2

33 U.S.C. § 1342(l)(1) 25

33 U.S.C. § 1342(l)(2) 25

TABLE OF AUTHORITIES

Page

33 U.S.C. § 1362(p) 4

33 U.S.C. § 1362(14) 3, 4, 25

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33 U.S.C. § 1369(b) 20

33 U.S.C. § 1369(b)(1) 19, 20, 21, 26

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40 C.F.R. § 122.27 4

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TABLE OF AUTHORITIES

Page

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TABLE OF AUTHORITIES

Page

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Page

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AMICUS CURIAE BRIEF OF THE RUFFED GROUSE SOCIETY

Pursuant to Supreme Court Rule 37.2 the Ruffed Grouse Society (sometimes hereinafter "the Society") respectfully submits this brief on behalf of itself and its members, in support of Petitioners as *amicus curiae*.[1]

IDENTITY AND INTERESTS OF *AMICUS CURIAE*

The Society, established in 1961, has 15,476 members across the United States and Canada, representing some 113 local chapters.[2] The Society is the only non-profit wildlife conservation organization dedicated to promoting conditions favorable for ruffed grouse, american woodcock, 43 species of neo-tropical songbirds, and other associated early forest wildlife in order to sustain our hunting tradition and outdoor heritage.

Proper management of the public and private forests is critical to the Society and the wildlife for

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[1] The parties have consented to the filing of this *amicus curiae* brief by filing blanket consents with this Court. *See id.* Pursuant to Supreme Court Rule 37.6, no party, or counsel for a party, made a monetary contribution intended to fund the preparation or submission of the brief. No one other than the *amicus*, their members, and their counsel made such a contribution.

[2] http://www.ruffedgrousesociety.org/.

which it advocates. The Society employs five regional biologists and a Director of Conservation Policy who provide scientific guidance and comments on state and federal rulemaking, programmatic management plans and site-specific projects. The Society's Management Area Program, initiated in 1985, provides technical and financial assistance to public land management agencies to assist in the conservation of early successional forest habitat. There are currently over 600 projects in 28 states, encompassing more than 500,000 acres. Also, through its Coverts program, the Society funds research and provides workshops, assistance and education to private landowners covering millions of acres of private forests. The Society and its members have a direct interest in the outcome of this case because a shift in the legal and regulatory conditions will impact the access and habitat maintenance that the Society supports.

STATEMENT OF THE CASE

The Clean Water Act (the "Act") prohibits the discharge of a "pollutant" into waters of the United States from a "point source" without a National Pollutant Discharge Elimination System ("NPDES") permit.[3] The Act defines a "point source" as "any discernible, confined and discrete conveyance, including

[3] 33 U.S.C. §§ 1311(a), 1342.

but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged."[4] The Act expressly exempts "agricultural stormwater discharges and return flows from irrigated agriculture" from the definition of "point source." It does not define "agricultural stormwater" or "nonpoint sources."

In 1976 the EPA initially promulgated the Silvicultural Rule, which defines a class of activities as silvicultural point sources, and interprets nonpoint source silvicultural activities as outside the NPDES program.[5] It limits silvicultural point sources to "rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States."[6] Not included as a point source are "non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, *or road construction and maintenance from which there is natural runoff.*"[7]

This case began when the Respondent filed suit against the Oregon Board of Forestry, an Oregon

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[4] 33 U.S.C. § 1362(14).

[5] 40 C.F.R. § 122.27(b)(1); *see also* 45 Fed. Reg. at 33,446-47.

[6] *Id.*

[7] *Id.* (emphasis added).

forester, and various private entities that had been involved in timber harvesting operations. The suit was brought as a Clean Water Act citizen suit arguing that the Petitioners failed to obtain a NPDES permit for channeled stormwater runoff from certain forest access roads as required by 33 U.S.C. § 1362(p). The Petitioners responded by claiming the Silviculture Rule, established in 40 C.F.R. 122.27, exempted those logging roads from the NPDES permit requirement. The district court agreed that the Rule applied and dismissed the complaint on that basis.

On appeal, the Ninth Circuit Court of Appeals reversed finding that because the Silviculture Rule exempted stormwater and other natural runoff that was controlled, channeled, or discretely conveyed, the Act's definition of a point source in § 1362(14) and the EPA's Rule were irreconcilable.[8] Therefore, the Ninth Circuit invalidated the Silviculture Rule holding that the EPA did not have the authority to override the will of Congress as unambiguously expressed in § 1362(14).[9]

SUMMARY OF THE ARGUMENT

1. The decision below endangers the viability of ruffed grouse, American woodcock and other associated

[8] *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1078-80 (9th Cir. 2011).

[9] *Id.*

wildlife by creating serious economic disincentives for the creation of young forest habitat. If upheld, the decision will negatively affect the ability of the *amicus* and its public and private partners to continue active forest management in order to create early successional forest habitat.

2. The court of appeals's willingness to entertain this challenge to the Siliviculture Rule is an example of judicial overreaching. Congress, in passing the Clean Water Act, expressly limited review of EPA administrative rulemaking to 120 days from promulgation. That period long passed as it relates to the 36-year-old Silviculture Rule. In addition, Congress further specified that any challenges to such EPA rules be brought as an original action in the circuit court of appeals. Despite the passage of time and the incorrect forum, the court of appeals allowed a private interest group to resurrect a time-barred challenge to this EPA rule in the context of a citizen enforcement action. The court of appeals was able to arrive at the merits by declaring an ambiguity in the Rule created only by a subsequent *amicus* brief filed by the United States. This Court should reverse the judgment, because the court of appeals ignored clear Congressional limitations on its judicial review and because such a precedent will create regulatory uncertainty and place any number of longstanding exemptions in jeopardy.

ARGUMENT

I. THE DECISION BELOW THREATENS THE CONTINUED VIABILITY OF EARLY-SUCCESSIONAL FOREST SPECIES.

A. Wildlife Dependent Upon Early Successional Habitat Are Already Threatened By Declining Habitat.

By its nature, early successional or young forest is ephemeral. Currently, early successional habitat and its dependent species are in decline. Early successional forest is defined by an open leaf canopy, which allows sufficient sunlight penetration to the forest floor to support the growth of certain tree, shrub and grass species that cannot survive in a mature, closed canopy forest. Furthermore, early successional animal species find food and shelter among the young shrubs and saplings that thrive in recently harvested areas. In order to sustain the full array of forest wildlife, we must sustain the full array of forest habitats; very young forests, very old forests, and all ages in between.

Data from the USDA-Forest Service demonstrates the extreme decline of the availability of young forest habitat on federal forest lands.[10] Throughout the northeastern and northcentral United States, young forest habitats have decreased by 45% over the past 25-30 years despite the fact that total forest land has

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[10] US Forest Service Forest Inventory and Analysis Database, available at: http://fia.fs.fed.us/tools-data/other/default.asp.

increased by 5%.[11] In virtually every region of eastern North America the amount of open habitat has diminished.[12] Habitats that have declined in area by more than 98% include grassland, savanna, and shrubland communities.[13] Early successional habitat consisting of seedling-sapling stands now represent the smallest portion of forest lands in northeastern (e.g., Massachusetts: 4%) and north-central (e.g., Illinois: 3%) states.[14]

As young forest land diminishes, so too does the wildlife that it feeds and shelters. Many bird species that depend upon young forest habitats are experiencing dramatic population declines due to the loss of these habitats.[15] Disconcertingly, since 1966, 53% of the bird species that breed in young forest habitats have declined.[16] In February 2007, the American Bird

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[11] *Id.*

[12] Robert A. Askins, *Sustaining Biological Diversity in Early Successional Communities: The Challenge of Managing Unpopular Habitat,* Wildlife Society Bulletin, Vol. 29, No. 2 (Summer, 2001), p. 407.

[13] *Id.*

[14] John A. Litvaitis, *Importance of Early Successional Habitats to Mammals in Eastern Forests,* Wildlife Society Bulletin, Vol. 29, No. 2 (Summer, 2001), p. 467.

[15] W.C. Hunter, D.A. Buehler, R.A. Canterbury, J.L. Confer and P.B. Hamel, *Conservation of Disturbance-dependent Birds in Eastern North America.* Wildlife Society Bulletin, Vol. 29 pp. 440-455 (2001).

[16] US Fish and Wildlife Service Breeding Bird Survey Database available at: http://www.mbr-pwrc.usgs.gov/bbs/bbs.html.

Conservancy classified early successional, deciduous forest habitat in the eastern United States as one of the nation's 20 most threatened bird habitats. Birds of young forest habitats in the eastern United States that are currently federally listed under the Endangered Species Act include the Kirtland's warbler (*Dendroica kirtlandii*) and black-capped vireo (*Vireo atricapilla*) and the Florida scrub jay (*Aphelocoma coerulescens*). Game birds like the ruffed grouse (*Bonasa umbellus*), the most popular upland game bird throughout much of its range, the American woodcock (*Scolopax minor*), and bobwhite quail (*Colinus virginianus*) are experiencing similar population declines. Approximately 92% of the range of the ruffed grouse occurs in areas where aspen, an early successional species, is an important component of the forest.[17] The loss of young forest habitat is the predominant cause of these declines.[18] The high stem densities that characterize early-successional habitats allow for ideal cover from predators and the lush

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[17] Todd M. Fearer, F. Stauffer, *Relationship of Ruffed Grouse (Bonasa umbellus) Home Range Size to Landscape Characteristics*. American Midland Naturalist, Vol. 150, No. 1, p. 104 (Jul., 2003).

[18] Daniel R. Dessecker and Daniel G. McAuley, *Importance of early successional habitat to ruffed grouse and American woodcock*. Wildlife Society Bulletin 29:456-465 (2001); *and* T.R. Cooper and K. Parker, *American woodcock population status, 2012* US Fish and Wildlife Service, Laurel, MD available at: http://www.fws.gov/migratorybirds/NewReportsPublications/PopulationStatus/Woodcock/2012%20American%20Woodcock%20Population%20Status,%202012.pdf.

herbaceous vegetation provides abundant forage for many species of wildlife, enabling population growth that cannot be obtained in mature forests.[19] To ensure the survival of these species, young forest habitats must be sustained on the landscape through silvicultural treatments and other mechanical means implemented at regular intervals. There are no other viable management alternatives.

B. Silvicultural And Active Management Practices Have Been Shown To Increase The Habitat And Population Size Of Early Successional Species.

Today, silvicultural treatments and other forms of active forest management are the only means of maintaining young forest habitats. Historically, young forest land was created through ecological disturbances of natural and human origin.[20] Prior to European settlement, the disturbance regime included fires of natural and Native American origin, windstorms, drought, flooding, insect and disease

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[19] Erik G. Endrulat, Scott R. McWilliams and Brian C. Tefft, *Habitat Selection and Home Range Size of Ruffed Grouse in Rhode Island*, Northeastern Naturalist, Vol. 12, No. 4, p. 411 (2005).

[20] Jeffrey D. Brawn, Scott K. Robinson and Frank R. Thompson III, *The Role of Disturbance in the Ecology and Conservation of Birds*, Annual Review of Ecology and Systematics, Vol. 32 (2001).

outbreaks, and beaver (Castor canadensis) activity.[21] Later, the abandonment of eastern farmlands during westward expansion allowed the generation of young forest habitat though plant succession. Environmental disturbances play a fundamental role in maintaining the natural heterogeneity of vegetation and vegetation age classes.[22] However, human activity including extensive fire suppression, insecticide application, and agricultural and urban expansion has disrupted the natural disturbance cycle relied on for young forest creation.[23] As these historical natural disturbances have declined, the amount of young forest habitat and its dependent wildlife species have also declined.

Today, in lieu of a regime of natural disturbance, silviculture and other forms of active forest management have become the primary agents of early successional forest creation.[24] To ensure a continuous

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[21] Margaret K. Trani, Robert T. Brooks, Thomas L. Schmidt, Victor A. Rudis and Christine M. Gabbard, *Patterns and Trends of Early Successional Forests in the Eastern United States*, Wildlife Society Bulletin, Vol. 29, No. 2, p. 413 (Summer, 2001).

[22] Jeffrey D. Brawn, Scott K. Robinson and Frank R. Thompson III, *The Role of Disturbance in the Ecology and Conservation of Birds*, Annual Review of Ecology and Systematics, Vol. 32 (2001), p. 252.

[23] Charles B. Halpern and Thomas A. Spies, *Plant Species Diversity in Natural and Managed Forests of the Pacific Northwest*, Ecological Applications, Vol. 5, No. 4, p. 914 (Nov., 1995).

[24] Robert T. Brooks, *Abundance, distribution, trends and ownership patterns of early successional forests in the northeastern United States*, Forest Ecology and Management 185, 2003,

(Continued on following page)

supply of young forest habitat on the landscape, commercial forest management practices must be implemented approximately every ten years.[25] Timber harvests implemented at regular intervals have displayed a benefit to many early successional species.[26] Even-aged treatments, which remove most of the mature trees in a particular stand at the same time, have been shown to be a key feature enabling increased bird species diversity.[27] Specifically, in the Missouri Ozark, the Kentucky warbler, black-and-white warbler, and worm-eating warbler reached their highest population densities in post-harvest forests where even-age silvicultural treatments were the primary form of silviculture.[28] In a long-term

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available at: http://www.fs.fed.us/ne/newtown_square/publications/other_publishers/OCR/ne_2003_brooks001.pdf.

[25] Daniel R. Dessecker and Daniel G. McAuley, *Importance of Early successional habitat to ruffed grouse and american woodcock*, Wildlife Society Bulletin, Vol. 29 (2), p. 460 (2001).

[26] John M. Hagan, Peter S. McKinley, Amy L. Meehan, Stacie L. Grove, *Diversity and Abundance of Landbirds in a Northeastern Industrial Forest*, The Journal of Wildlife Management, Vol. 61, No. 3, pp. 718-735 (Jul., 1997).

[27] Richard H. Yahner, *Effects of Habitat Patchiness Created by a Ruffed Grouse Management Plan on Breeding Bird Communities*, American Midland Naturalist, Vol. 111, No. 2, p. 409 (Apr., 1984).

[28] Frank R. Thompson, III, William D. Dijak, Thomas G. Kulowiec and David A. Hamilton, *Breeding Bird Populations in Missouri Ozark Forests with and without Clearcutting*, The Journal of Wildlife Management, Vol. 56, No. 1, p. 28 (Jan., 1992); *and* Michael J. Wallendorf, Paul A. Porneluzi, Wendy K. Gram, Richard L. Clawson and John Faaborg, *Bird Response to*

(Continued on following page)

study of the effects of silvicultural practices on ruffed grouse and other bird species, abundance and diversity increased in young forest stands that were recently regenerated using these even-age treatments.[29] While managing early successional forests undoubtedly supports its attendant species, such active management creates a mosaic of forest habitats that also benefit mature forest species.[30] Ultimately, science-based forest management, which includes silvicultural treatments, is science-based wildlife management.

C. Requiring Npdes Stormwater Permits For Forest Roads Will Have Adverse Economic Effects On Landowners, Industry, And State Agencies And Will Place Significant New Barriers Upon Active Forest Management.

Federally owned forests lands, like the National Forests, managed by the United States Forest Service, are bounded by dozens of federal laws and regulations, which "ha[ve] kept the agency from effectively addressing rapid declines in forest

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Clear Cutting in Missouri Ozark Forests, The Journal of Wildlife Management, Vol. 71, No. 6, p. 1903 (Aug., 2007).

[29] Richard H. Yahner, *Responses of Bird Communities to Early Successional Habitat in a Managed Landscape*, The Wilson Bulletin, Vol. 115, No. 3, p. 292 (Sep., 2003).

[30] Richard H. Yahner, *Effects of Habitat Patchiness Created by a Ruffed Grouse Management Plan on Breeding Bird Communities*, American Midland Naturalist, Vol. 111, No. 2, p. 409 (Apr., 1984).

health."[31] The Forest Service refers to this dilemma "analysis paralysis" or "the process predicament."[32] Unfortunately, the decision below would only cause that predicament to spread to all State, Tribal and private forests.

Private forests account for over 427 million acres owned by over 10 million private owners.[33] The briefs filed by the commercial logging industry make it clear that the permitting requirements will cause widespread economic harm as their members are forced to scale back their operations. However, the burden of NPDES permitting requirements should not be taken lightly and will not be borne exclusively by industry. Non-industrial, small tract forest owners will be the hardest hit under any potential expansion of NPDES permitting of forest access roads. These small private forest landowners collectively own 72% of the forestland in the eastern United States.[34] They depend on a return from forest products to provide an

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[31] USDA Forest Service, The Process Predicament: How Statutory, Regulatory, and Administrative Factors Affect National Forest Management, p. 5 (2002) (http://www.fs.fed.us/projects/documents/Process-Predicament.pdf).

[32] *Id.* at p. 21.

[33] National Alliance of Forest Owners, *Working Forests*, available at: http://nafoalliance.org/policy-issues/working-forests/ – accessed on July 18, 2012.

[34] W.B. Smith, J.S. Vissage, D.R. Darr and R.S. Sheffield, *Forest Resources of the United States, 1997: General Technical Report NC-219*, US Department of Agriculture, Forest Service, North Central Research Station (2001).

economic incentive to actively manage their forests. The estimated cost of an NPDES permit on a single private landowner is $24,000.[35] In addition to requiring Best Management Practices ("BMPs"), an NPDES permit would require forest owners to obtain a Stormwater Management Plan, prepared by a qualified professional, specifying site-by-site controls and detailing a mentoring and inspection routine.[36] Compliance is mandatory and subject to both substantial government enforcement penalties and private citizen suits under the Clean Water Act. While managers of industrial forest lands are well versed in federal- and state-level permitting processes, non-industrial private forest landowners have little knowledge of, or expertise with these processes. Most small landowners would need to hire or develop internal staff to perform and write analyses or outside consultants to prepare necessary documents.[37] Adding an NPDES permit requirement for these small private forest owners would provide a disincentive so significant

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[35] Frederick Cubbage and Robert Abt, *Potential Administrative and Economic Impacts of NPDES Permit Requirements for Forest Roads in the South* (Dec. 7, 2011) available at: http://nafoalliance.org/wp-content/uploads/Road-Permit-Costs-in-South1.pdf.

[36] *See generally* George G. Ice, Erik Schilling and Jeff Vowell, *Trends for Forestry Best Management Practices Implementation*, Journal of Forestry (Sept. 2010) available at: http://nafoalliance.org/wp-content/uploads/JOF-9-10-BMP.pdf.

[37] Cubbage at 7.

that only the most savvy and wealthy owners could possibly afford to continue operations.

NPDES permitting for stormwater runoff from forest access roads will raise costs directly and indirectly for those parties seeking permits, as well as the state or federal agencies granting such permits. One study, estimating the effects on thirteen southern states, describes the increased costs to forest owners as "punitive," and coupled with existing property taxes would at times exceed the value of annual timber growth.[38] Aggregate costs for landowners, procurement dealers, loggers, and forest products firms in these states range from $420 million to $4 billion.[39] State agencies would see an increased cost of as much as $1 million annually in small states alone.[40] Indeed, one study concludes that small tract private timberland owners would be the hardest hit by any of the [permitting] scenarios and costs for permitting on a per acre basis are negatively correlated with parcel size.[41] In Maine alone, Stevens estimated the cost of initial permitting of the 6.1

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[38] *Id.* at 3.

[39] *Id.*

[40] *Id.*

[41] D. Stevens, *Report: Estimated cost impacts of ruling change for forest roads in the state of Maine* (2011), available at: http://nafoalliance.org/wp-content/uploads/Road-Permit-Costs-in-Maine-Northeast-Lake-States ("This predicts that under any of the three [permitting] scenarios smaller tract owners will either pay more per acre for permitting, or be the first to stop harvesting after new rules are promulgated.").

million acres of small tract private timberland to be of equal or greater total magnitude than the 9.5 million acres held by large tract landowners.[42] As a result, Cubbage estimates that net timber sales returns for a typical 32 acre tract would suffer a decrease of 71%, while larger tracts of 80 acres would lose 19% of net timber sales returns.[43]

For many landowners these new cost barriers will be prohibitive. By increasing the scope and scale of the permitting process, this decision will contribute to the decline of an already shrinking wildlife habitat that relies upon continued forest management of both public and private forest owners. This decision will compound the ecological dangers discussed above with additional barriers to adequate forest management. The stakes could not be higher for early successional forest species. Experience has shown that the thoughtful implementation of state BMPs designed to meet site-specific conditions effectively controls stormwater discharges from forest roads. Excessive regulatory oversight of stormwater discharges from forest roads will only diminish the likelihood that these landowners will initiate the active forest management required to sustain wildlife of young forest habitats. A downturn in active forest management on state and private lands, combined with the bitter administrative logjam that plagues the National

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[42] Stevens at 4.

[43] Cubbage at 3.

Forest system will only speed up the demise of early successional forest habitats and could result in sufficient declines of many bird species to warrant federal listing under the Endangered Species Act.

II. THE DECISION BELOW IGNORES AN EXPRESS CONGRESSIONAL LIMITATION UPON JUDICIAL REVIEW, WHICH, IF UPHELD, WOULD RESULT IN REGULATORY CHAOS.

A. The Court Of Appeals Did, In Fact, Invalidate The EPA's Silvicultural Rule.

As a threshold matter, this Court should recognize that the court of appeals did implicitly invalidate the Silvicultural Rule. Under the Rule "road construction and maintenance from which there is natural runoff" are defined as "nonpoint sources" such that NPDES permits are not required. By contrast, the court of appeals rejected this definition and held that "stormwater runoff from logging roads that is collected by and then discharged from a system of ditches, culverts and channels *is* a point source discharge for which an NPDES permit is required." *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1087 (9th Cir. 2011) (emphasis added).

In its *amicus* brief opposing certiorari the United States argued that "the court of appeals did not expressly or implicitly invalidate the Silivicultural

Rule."[44] It argued that the court of appeals merely chose between two competing interpretations of the rule. However, to characterize the court of appeals' holding as mere "interpretation" of the Rule is simply inaccurate. Instead, the court of appeals effort to redefine a silvicultural point source can only be seen as an implicit declaration that the Silvilcultural Rule was invalid as written.

In *Environmental Defense. v. Duke Energy Corp.*, this Court addressed the Fourth Circuit's claim that it did not invalidate the EPA's Prevention of Significant Deterioration ("PSD") regulations under the Clean Air Act ("CAA").[45] The EPA filed an enforcement action against Duke Energy for failing to obtain a permit after its replacement of 29 tube assemblies.[46] Duke argued that it did not need to obtain a permit because its work did not constitute a "major modification" as defined by the 1980 PSD regulations.[47] The court of appeals eventually agreed with Duke's position and held that the EPA lacked authority to interpret the term "modification" differently in the PSD regulations as it had in the New Source Performance

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[44] Brief for United States as *Amicus Curiae* Opposing Certiorari at p. 8 (May 24, 2012).

[45] *Envt'l Def. v. Duke Energy Corp.*, 549 U.S. 561, 573, 127 S. Ct. 1423, 1432, 167 L. Ed. 2d 295 (2007).

[46] *Id.* at 570-71.

[47] *Id.* at 571.

Standards.[48] However, this Court reversed, holding that the Fourth Circuit improperly entertained a challenge to the PSD regulations, outside of the judicial review limitations upon EPA regulations contained within the CAA.[49]

Just as in *Duke Energy*, the Ninth Circuit's "interpretation" of the Silvicultural Rule crossed the line from a "purposeful but permissible reading of the regulation" to one that "can only be seen as an implicit declaration that the . . . regulations were invalid as written."[50] Therefore, as a threshold matter, this Court should conclude in accordance with *Duke Energy* that the court of appeals did, in fact, invalidate the EPA's Silvicultural Rule at issue.

B. The "Arising After" Exception To 33 U.S.C. § 1369(b)(1) Does Not Apply Because The Silvicultural Rule Is Unambiguous.

Time limitations on judicial review of agency regulations are jurisdictional in nature.[51] The Clean Water Act contains important limitations to judicial review of regulations like the Silviculture Rule.

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[48] *Id.* at 572; *see also United States v. Duke Energy Corp.*, 411 F.3d 539, 549 (4th Cir. 2005).

[49] *Id.* at 581.

[50] *Id.* at 573.

[51] *Nat'l Min. Ass'n v. U.S. Dept. of Interior*, 70 F.3d 1345 (D.C. Cir. 1995).

Section 1369(b)(1) requires that any challenges to the EPA Administrator's actions must be brought within 120 days of such action. By contrast, this case was filed as a private civil enforcement action under 33 U.S.C. § 1365(a)(1), which allows private actions to be filed in the district courts against persons who are alleged to be in violation of the effluent standards or limitations, including NPDES permits. However, the Act limits the scope of challenges that may be brought as a private enforcement action. Specifically, any action that could have been brought under § 1369(b)(2) "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." These limitations upon judicial review are central to this case.

To maintain its subject matter jurisdiction under 33 U.S.C. § 1365(a) as constrained by the limitations of § 1369(b), the court of appeals couched its decision in terms of "interpretation" as opposed to outright "invalidation" of the Silvicultural Rule. In doing so, it determined that the Rule was "susceptible to two different readings" in order to apply the statute's "arising after" exclusion. *Brown*, 640 F.3d at 1068. "Under one reading," wrote the court, "the Rule does not require permits for silviculture stormwater run-off." *Id.* at 1068. According to the court of appeals, it was this reading that the United States "adopted . . . for the first time in its initial *amicus* brief in this case." *Id.* As such, because the court concluded that the *amicus* brief constituted a new interpretation of the Rule, it held that the "arising after" exception

contained within § 1369(b)(1) applied, thereby allowing it to proceed to the merits.[52]

The court of appeals erred when it concluded that the *amicus* brief created an ambiguity in the Rule. Under a plain reading of the Rule, the EPA has exempted silvicultural activities such as "harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff" from the definition of a point source. 40 C.F.R. § 122.27(b)(1). Rightly or wrongly, the Rule's text clearly excludes the logging roads at issue from being defined as a point source. There simply is no ambiguity.

At the very least, the Silvicultural Rule as originally promulgated and applied over the years by the EPA provided the public "adequate notice that it could be interpreted as the [EPA] now does." *Paralyzed Veterans of Am. v. D.C. Arena L.P.*[53] Contrary to the court of appeals' conclusion, the present interpretation of Rule as not requiring NPDES permits is not new. The EPA asserted the same interpretation of the Rule in *Envtl. Def. Ctr., Inc. v. U.S. E.P.A.* ("EPA promulgated silviculture regulations in 1976 that exclude from NPDES permit requirements certain

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[52] Assuming, *arguendo*, that ambiguity exists such that the "arising after" exclusion applies, the challenge then should have been dismissed as falling within the exclusive original jurisdiction of the court of appeals. 33 U.S.C. § 1369(b)(1)(E)-(F).

[53] 117 F.3d 579, 585 (D.C. Cir. 1997).

silvicultural activities that EPA determined constitute non-point source activities, including "surface drainage, or road construction and maintenance from which there is natural runoff.").[54] Likewise, in *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.* the EPA informed the district court that it had authority to determine whether certain silvicultural sources were nonpoint and therefore not subject to the NPDES program.[55] In its motion for summary judgment in that case the EPA wrote:

> In sum, in section 122.27, EPA distinguished between point source silvicultural activities, which are subjected to the permitting system, and nonpoint source silvicultural activities, which do not require NPDES permits. Because the CWA clearly provides EPA with the discretionary authority to make this distinction, promulgation of the regulation at issue was within EPA's authority. . . .[56]

The initial position of the United States in this case similarly acknowledged the regulation's clarity.[57] Even the Respondents had little difficulty identifying

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[54] 344 F.3d 832, 861 (9th Cir. 2003).

[55] 266 F. Supp. 2d 1101, 1112 (N.D. Cal. 2003).

[56] *Id.* Civil Case No. 3:01-cv-02821-MHP, Doc. 118 at 19 (Sept. 5, 2003).

[57] "The plain language of EPA's silviculture regulations, promulgated over thirty years ago, exclude runoff from forest roads from the requirement to obtain an NPDES permit." U.S. *Amicus* Brief at 18, *NEDC v. Brown*, No. 306-CV-01270 (D. Or., filed Dec. 6, 2006).

the position of the EPA in its First Amended Complaint without the benefit of the later *amicus* brief.[58]

In spite of the apparent clarity over the Rule's exclusion of logging roads from the definition of a silvicultural point source, the court of appeals announced that "[u]ntil the United States filed that brief, there was no way for the public to know which reading of the Silvicultural Rule it would adopt." 640 F.3d at 1069. Despite this pronouncement, the interpretation the United States advanced in its *amicus* brief is entirely consistent with its past views. As this Court previously explained, "where the text of a regulation is unambiguous, a conflicting agency interpretation advanced in an *amicus* brief will necessarily be 'plainly erroneous or inconsistent with the regulation' in question." *Chase Bank USA, N.A. v. McCoy*.[59] To the extent the United States' second *amicus* brief in this case can be construed to create an ambiguity, the Court should freely disregard the brief as inconsistent with the otherwise unambiguous Silvicultural Rule. It follows then that because the Rule is unambiguous, the court of appeals' decision to entertain a challenge to the 36-year-old Rule in the context of an enforcement action cannot be sustained by the time limitations found in 33 U.S.C. § 1369(b).

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[58] *See* First Amended Complaint ¶¶ 40-41.

[59] 131 S. Ct. 871, 882, 178 L. Ed. 2d 716 (2011), *citing Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 911, 137 L. Ed. 2d 79 (1997).

C. The Decision Below Would Result In Regulatory Uncertainty If Upheld.

As a party that regularly comments on all agency rules, programmatic plans and projects that affect the forest and early successional habitat favored by ruffed grouse and American woodcock, the decision below is of great concern. The Society participates at the early stages of the administrative process, in part, because of the finality of the process. By allowing a regulation to be subjected to judicial review at any point in the future under the guise of ambiguity results in a waste of administrative resources[60] and puts any and every regulation in limbo awaiting a clever litigation strategy.[61] In addition, by allowing parties to challenge agency regulations through a citizen enforcement action to which the governmental agency is not even a party, the parties are able to circumvent the will of Congress in bypassing the original jurisdiction of the Courts of Appeal.

The decision will result in administrative gridlock of a magnitude never seen before. The court of appeals' decision cannot be reasonably limited to

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[60] Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 Cardozo L. Rev. 2203, 2204 (2011) ("A core idea behind these provisions is that rules adopted in these regulatory areas can entail enormous up-front investments of money, effort, and advance planning.").

[61] For example, in this case the respondents transformed an unripe citizen enforcement action into a vehicle for challenging agency regulations based only upon a subsequent *amicus* brief filed by a non-party.

apply to only logging roads covered by the Silvicultural Rule. Its rationale will apply equally to all forest roads, whether used for logging or not. All roads that are served by ditches and culverts and eventually discharge into natural surfaces waters would be swept up in its regulatory net. Contrary to the court's assumptions of fact, many forest roads, including the roads at issue in this case, are not dedicated to logging. This would burden all private forest landowners and all who rely upon these roads for recreational and hunting access.

If this Court does not reverse the decision below, one commentator has suggested that it could call into doubt countless other Clean Water Act exemptions, such as those found within the agricultural industry for concentrated animal feeding operations under 33 U.S.C. § 1362(14) and agricultural return flows under 33 U.S.C. § 1342(l)(1) or stormwater runoff from oil, gas and mining operations under 1342(l)(2).[62] More importantly, the rulemaking process will lose any meaning to stakeholders like the Society as certainty is removed from the process.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals for the

[62] Mark A. Ryan, *Ninth Circuit Upends the CWA Applecart*, Nat. Resources & Env't, Winter 2011 at 51.

Ninth Circuit with instructions that the action be dismissed as time-barred under 33 U.S.C. § 1369(b)(1).

Respectfully submitted,

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